Simon v. Adzilla, Inc [New Media] et al
Doc. 158 Att. 26

EXHIBIT GG

Dockets.Justia.com

G. HOPKINS GUY, III (STATE BAR NO. 124811)
I. NEEL CHATTERJEE (STATE BAR NO. 173985)
MONTE COOPER (STATE BAR NO. 196746)
ROBERT D. NAGEL (STATE BAR NO. 211113)
JOSHUA H. WALKER (STATE BAR NO. 224940)
ORRICK, HERRINGTON & SUTCLIFFE LLP
1000 Marsh Road
Menlo Park, CA 94025
Telephone: 650-614-7400
Facsimile: 650-614-7401

Attorneys for Plaintiff
THEFACEBOOK, INC.

ENDORSED
2005 NOV 21 AM 11:23
KIRI TORRE, CEO
SUPERIOR COURT OF CA.
CO. OF SANTA CLARA
BY Rose Rojas DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

THEFACEBOOK, INC., Plaintiff, v. CONNECTU LLC, CAMERON WINKLEVOSS, TYLER WINKLEVOSS, HOWARD WINKLEVOSS, DIVYA NARENDRA, AND DOES 1-25, Defendants.	CASE NO. 1:05-CV-047381 **NOTICE OF *EX PARTE* APPLICATION AND APPLICATION TO COMPEL DEPOSITIONS OF DEFENDANTS RELATED TO PERSONAL JURISDICTION; MEMORANDUM OF POINTS AND AUTHORITIES** Date: November 21, 2005 Time: 8:15 a.m. Dept.: 14 The Honorable Derek Woodhouse Complaint Filed: August 17, 2005 Motions to Quash Filed: Oct. 25, 2005 Amended Motion Filed: November 14,2005 Hearing for Motion to Quash: Jan. 17, 2006

TO ALL PARTIES AND COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on Monday, November 21, 2005 at 8:15 a.m., or as soon thereafter as this matter may be heard by the Honorable Judge Derek Woodhouse at Department 14 of the Superior Court of California, County of Santa Clara, located at 191 N. First Street, San Jose, California 95113, Plaintiff TheFacebook, Inc. ("Facebook") hereby applies *ex parte* for an order compelling Defendants Cameron Winklevoss', Tyler Winklevoss', Howard Winklevoss', and Divya Narendra's (collectively "Individual Defendants") to submit to depositions on or before December 23, 2005.

Individual Defendants jointly filed a motion to quash on October 26, 2005, claiming that they are not subject to personal jurisdiction in this Court, and set the matter for hearing on November 17, 2005. On November 3, 2005, the Court (Hon. William J. Elfving) granted Facebook's *ex parte* application to delay the hearing on the motion to quash until January 17, 2006 so that Facebook could obtain discovery related to personal jurisdiction.[1]

The Facebook's application, which the Court granted, attached the proposed interrogatories, document requests, *and the depositions* of the various Defendants – each of which are necessitated, under California law, in order to oppose the Individual Defendants' motion. Facebook has noticed depositions of the Individual Defendants and ConnectU between December 12 and December 16, 2005. Despite the fact that these deposition notices, as proposed, were filed with the Court and specifically discussed at hearing, Defendants have now clearly indicated that they intend to seek protection from these deposition notices. However, upon checking the Court's calendar, Facebook and Defendants were both informed by Court personnel that the earliest hearing date before Judge Woodhouse is January 6, 2006. If Facebook waits for Defendants to file a motion for a protective order preventing them from attending the noticed depositions, the hearing on any Defendant motion would not be heard in time. Based on the current January 17, 2006 hearing date, Facebook's opposition is due Tuesday, January 3, 2005 making it necessary for Facebook to depose the Individual Defendants and ConnectU by approximately December 23,

[1] On November 14, 2005, the Individual Defendants filed an amended motion to quash.

2005.

Facebook is therefore forced to seek immediate relief from this Court pursuant to California Rule of Court 379, to compel all Individual Defendants and ConnectU to submit to depositions on or before December 23, 2005.

This *ex parte* application is based on this application, the memorandum of points & authorities and the declaration of Monte Cooper ("Cooper Declaration"). The parties have met and conferred on and in advance of this application but were not able to resolve the matter. (*See* Cooper Decl. ¶¶ 7-9; Exs. E, F, G (detailing prior telephonic conference attempting to resolve matter and e-mail notices to Defendants).) Additional notice of this *ex parte* application has been given to Defendants' counsel on Sunday, November 20, 2005. Defendants' counsel in this matter is:

Scott R. Mosko, Esq.
Finnegan, Henderson, Farabow, Garrett & Dunner, LLP
700 Hansen Way
Palo Alto, California 94304
(650) 849-6672

Dated: November 20, 2005

ORRICK, HERRINGTON & SUTCLIFFE LLP

[signature]
Monte Cooper
Attorneys for Plaintiff TheFacebook, Inc.

MEMORANDUM OF POINTS & AUTHORITIES

I. STATEMENT OF FACTS

A. Background

The Facebook, Inc. ("Facebook") filed its Complaint on August 17, 2005, alleging common law misappropriation and violations of California Penal Code § 502(c) arising out of the Defendants' unauthorized access and use of data from the Facebook website. After Facebook extended two extensions of time for all of the Defendants to respond, on October 25, 2005, Cameron Winklevoss, Tyler Winklevoss, Howard Winklevoss, and Divya Narendra (collectively "Individual Defendants") filed and served their Motion to Quash Service of Complaint and Summons for Lack of Personal Jurisdiction ("Motion"); and Defendant ConnectU LLC ("ConnectU") filed and served its demurrer. Each of the four Individual Defendants submitted a substantive declaration in support of their Motion to Quash, alleging no basis exists to assert personal jurisdiction over them. (*E.g.*, Mot. at 2.)

In exchange for Plaintiff's liberal grant of additional time for all named Defendants to respond to its Complaint, Defendants agreed to allow discovery on personal jurisdiction. (*See* Cooper Decl. Ex. A, at 1 – 3). Defendants then reneged on their agreement, refusing all discovery on personal jurisdiction (in the face of clear California law allowing such discovery), and attempted to force what was supposed to have been a provisional November 17, 2005 hearing date on both the demurrer and their motion to quash. (*Id.*) Therefore, on November 3, 2005, Plaintiff applied *ex parte* for a rescheduling of the hearing on the motion to quash, so that it could obtain discovery related to personal jurisdiction. (*Id.*) The Court granted Facebook's application. (Cooper Decl. Ex. B.)

Facebook's application attached the proposed interrogatories, document requests, **and deposition notices** for the Defendants – each necessitated under California law in order to oppose the Individual Defendants' motion. In granting the request over Defendants' objections, the Court (Hon. William J. Elfving) postponed the hearing on both the motion to quash and the demurrer until January 17, 2006 – specifically so that Facebook could obtain such discovery. (Cooper Decl. Ex. B.) The need and legal warrant for the depositions was specifically discussed at the hearing, and Judge Elfving expressed no reservations about them despite the fact the Individual Defendants argued they were not warranted. Facebook served all of the discovery requests and notices of deposition that it had attached to its ex parte application immediately following the hearing granting its request. (*See* Cooper Decl. H (notices of deposition)).

Now, without substantial justification, Defendants are **once again** seeking to avoid personal jurisdiction-related discovery, notwithstanding the Court's earlier order. Facebook has noticed depositions of the Individual Defendants and ConnectU between December 12 and December 16, 2005. Despite the fact that these deposition notices were filed and specifically discussed at the hearing where Plaintiff's application was granted (*see id.* Ex. A), Defendants have in telephonic conferences informed Facebook's counsel that they intend to seek protection from these deposition notices – though they have not done so to date.

However, upon checking the Court's calendar, Facebook and Defendants were both informed by Court personnel that the earliest hearing date before the Discovery Judge is January 6, 2006. If Facebook waits for Defendants to file a motion for a protective order preventing them from attending the noticed depositions, the hearing on any Defendant motion would not be heard in time. Based on the current January 17, 2006 hearing date, Facebook's opposition is due Tuesday, January 3, 2005 making it necessary for Facebook to depose the Individual Defendants and ConnectU by approximately December 23, 2005. Defendants' only counter-proposal is to further delay the hearing on the motion to quash and demurrer to permit additional briefing on the deposition issue, even though it will have been **more than five months** since Facebook filed its complaint before such briefing can be completed and the motions heard.

Facebook thus is forced to seek immediate relief from this Court pursuant to California Rule of Court 379, to compel all Individual Defendants and ConnectU to submit to depositions on or before December 23, 2005, as previously noticed.

B. Need for Depositions

Each of the Individual Defendants attached a personal declaration in support of their joint motion. (*E.g.* Am. Mot. at 2.) The submission of these four declarations alone suggests that Plaintiff should be able to cross-examine the Individual Defendants. Here, that need is substantially increased by demonstrable inconsistencies and questions raised by both the Individual Defendants' pleadings and the declarations themselves.

For instance, not one of the Individual Defendants denies having personally and individually accessed Plaintiff's computer systems data or aiding in such access – such acts being themselves independent violations of California Penal Code § 502(c) and independent grounds for personal jurisdiction. Instead, as reflected by a recent amendment to the motion to quash, the Individual Defendants appear to admit they engaged in the actions that form the underlying bases for relief in the complaint, but contend that they only did so as the entity "ConnectU LLC." Obviously, this is an issue open to interpretation, and due process concerns alone warrant that Facebook be allowed to cross-examine the Defendants about the nature of their activities that they alleged were done as the entity ConnectU LLC. Defendants must be deposed on the scope and nature of their personal involvement in the acts alleged, because the full scope is relevant to the Court's personal jurisdiction over them.[2]

Additionally, the Declarations do not appear to present all of the factual information relevant to issues of personal jurisdiction. For instance, the Individual Defendants' assert that *none* of them have *ever*:

- paid taxes "of any kind" in California (*see* Am. Cpt. at 2);
- performed any service or sold any goods in California (*id.*);
- derived substantial revenue from California goods or services; (*id.*);
- recruited employees in California (*id.*);
- signed any contracts in California (*id.*);
- "engaged in a business in California" (*id.*).[3]

Yet, in direct contradiction of such averments, Howard Winklevoss, for one, appears to have engaged in business in California, paid at least business franchise taxes in California, based his personal business in California, and personally served as a registered agent in California –

[2] Furthermore, as must be fully explored at depositions, the Individual Defendants are seeking to hide behind an entity of which they were not declared members or officers until August 5, 2005, *after* many of the alleged acts were committed. In other words, the Individual Defendants' appear to be asserting official capacities which did not even exist throughout the relevant period. Again, the Individual Defendants must be cross-examined on this issue.

[3] *See also, e.g.*, Cooper Decl. Ex. C (Declaration of Defendant Howard Winklevoss submitted in support of Individual Defendants' motion, wherein Winklevoss unequivocally affirms that he personally has never done any of the following in California: "had an authorized agent or representative in California" (¶ 7), nor "performed any services of sold any goods in California" (¶ 10), nor derived substantial revenue from California goods or services (¶ 11), nor recruited employees in California (¶ 14), nor signed any contracts in California (¶ 15), nor "engaged in business" in California (¶ 12)).

specifically, in Palo Alto. *See* Cooper Decl. Ex. D (past filings of California stock corporation, *subsequently dissolved*, by a Howard E. Winklevoss and Carol J. Winklevoss (spouse), listing two Palo Alto addresses).[4] If verified at deposition, such past business conduct would plainly contradict both Individual Defendants' pleadings and at least portions of their supporting declarations. Such omissions reflect that Facebook should be entitled to investigate both the accuracy and completeness Individual Defendants' declarations, and further supports Plaintiff's request for limited depositions on matters relating to both general and specific personal jurisdiction, especially since Judge Elfving's earlier Order generally authorized discovery on personal jurisdiction, and the Individual Defendants have offered no explanation why depositions somehow should be excluded from that ruling given that they were specifically raised. The depositions are warranted.

II. DUE PROCESS AND CALIFORNIA DISCOVERY LAW MANDATES LIMITED DEPOSITIONS ON PERSONAL JURISDICTION

As Judge Elfving's earlier ruling intimates, California law dictates that Plaintiff is entitled to depositions and other discovery relating to issues of jurisdiction when they are faced with a motion to quash based on an alleged lack of jurisdiction. *See Mihlon v. Super. Ct.*, 169 Cal. App. 3d 703, 710 (App. 2 Dist. 1985) ("[t]he plaintiff has the right to conduct discovery with regard to the issue of jurisdiction to develop the facts necessary"); *Ziller Elec. Lab. v. Super. Ct.*, 206 Cal. App. 3d 1222, 1234 (App. 2 Dist. 1988) (court specified that its ruling for reconsideration of a motion to quash would not preclude plaintiff from conducting discovery regarding jurisdiction) (citing *1880 Corp. v. Super. Ct.*, 57 Cal. 2d 840, 843 (1962)); *Goehring v. Super. Ct.*, 62 Cal. App. 4th 894, 911 (App. 4 Dist. 1998) (citing *Mihlon*, 169 Cal. App. 3d at 711); *Orchid Biosciences*, 198 FRD 670 (SD Cal. 2001) (allowing depositions on personal jurisdiction).[5] *Cf. Warburton/Buttner*, 103 Cal. App. 4th 1170 (App. 4 Dist. 2002) (allowing limited depositions on subject matter jurisdiction). Jurisdiction over the individual defendants that act on behalf of a business entity depends on their individual actions and connections to California, including their acts on behalf of the entity. *Taylor-Rush v. Multitech Corp.*, 217 Cal. App. 3d 103, 117 (1st App. D. 1990); *Goehring*, 62 Cal. App. 4th 894 (court can allow discovery on individual defendants purporting to act on behalf of a business entity). Indeed, depositions are necessary to fully determine the extent to which each Individual Defendant authorized, directed, or actively participated in the wrongful acts, since such involvement, even on behalf of the corporation, would personally subject them to jurisdiction. *See, e.g.*, *Seagate Technology v. A.J. Kogyo Co.*, 219 Cal.App.3d 696 (1990) ("where corporate officers are alleged to have engaged in intentional tortious activity, directed at a California resident, jurisdiction over them is proper").

---

[4] His apparent creation of a California corporation in the past also makes it unlikely that he could have avoided ever entering into a contract in California, per his declaration. It is possible Defendant Winklevoss may explain or refute the glaring omission in his declaration, but he must do so under oath at deposition. The California contacts of Individual Defendants and their myriad family businesses – including ConnectU LLC's – must be explored, along with the true nature of their direct and personal involvement in the alleged acts.

[5] *Id.* at 674-75 (granting deposition on personal jurisdiction issues and stating that in order to defeat deposition notice, "Defendant must meet the relatively high burden of establishing that 'it is clear that further discovery would *not* demonstrate facts sufficient to constitute a basis for jurisdiction'") (emphasis in original; citation omitted).

The limited deposition notices Facebook issued include notice upon ConnectU, as well as upon the Individual Defendants, because all of the Individual Defendants admittedly are "members" of ConnectU and appear to have acted on ConnectU's behalf in ways related to this litigation. (*See, e.g.*, Am. Mot. at 1.) Moreover, the Individual Defendants declare only that they did not take data in their individual capacities. (*Id.* at 6). Thus, they imply that (i) Individual Defendants took Facebook data on ConnectU's behalf, and (ii) have committed other acts in their *individual* capacities, such as illegally accessing Facebook's computers, or aiding and abetting illegal access and misappropriation of data. Testimony that was obtained in a deposition of ConnectU in a separate federal action in Boston confirms such activity *See* Cooper Decl. Ex. I, at 147:24-151:3.

The Individual Defendants' submission of incomplete and controverted declarations practically mandates limited depositions on personal jurisdiction, because such depositions would be uniquely likely to uncover additional contacts by the Individual Defendants with California, including their personal wrongful conduct. Since the depositions also are sanctioned by California precedent, the Individual Defendants should be compelled to respond and testify.

III. CONCLUSION

For the reasons set forth above, the Court should authorize limited depositions of all Defendants.

Dated: November 2, 2005

ORRICK, HERRINGTON & SUTCLIFFE LLP

Monte Cooper
Attorneys for Plaintiff TheFacebook, Inc.

DOCSSV1:434999.4